

# DOCUMENT 1

## Kulschinsky, Edward

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**From:** Kulschinsky, Edward  
**Sent:** Thursday, May 26, 2016 9:33 AM  
**To:** Luc de gaspe beaubien  
**Cc:** Belser, Evan  
**Subject:** RE: FW: Activity in Case 7:16-cv-01631-TMC South Carolina Clean Air Initiative LLC v. Harbor Freight Tools Complaint

Thanks for the heads-up.

**From:** Luc de gaspe beaubien [mailto:[legalluke@gmail.com](mailto:legalluke@gmail.com)]  
**Sent:** Wednesday, May 25, 2016 6:30 PM  
**To:** Kulschinsky, Edward <[Kulschinsky.Edward@epa.gov](mailto:Kulschinsky.Edward@epa.gov)>; EVANS BENJAMIN <[EVANS.BENJAMIN@mahindra.com](mailto:EVANS.BENJAMIN@mahindra.com)>  
**Subject:** Fwd: FW: Activity in Case 7:16-cv-01631-TMC South Carolina Clean Air Initiative LLC v. Harbor Freight Tools Complaint

FYI. Harbor freight never gave suit to the citizen suit notices so it was filed first.

----- Forwarded message -----

**From:** Dan Haltiwanger <[dhaltiwanger@rpwb.com](mailto:dhaltiwanger@rpwb.com)>  
**Date:** Monday, May 23, 2016  
**Subject:** FW: Activity in Case 7:16-cv-01631-TMC South Carolina Clean Air Initiative LLC v. Harbor Freight Tools Complaint  
**To:** Luc de gaspe beaubien <[legalluke@gmail.com](mailto:legalluke@gmail.com)>

**From:** [SCDEfilingstat@scd.uscourts.gov](mailto:SCDEfilingstat@scd.uscourts.gov) [mailto:[SCDEfilingstat@scd.uscourts.gov](mailto:SCDEfilingstat@scd.uscourts.gov)]  
**Sent:** Monday, May 23, 2016 12:57 PM  
**To:** [scd\\_ecf\\_nef@scd.uscourts.gov](mailto:scd_ecf_nef@scd.uscourts.gov)  
**Subject:** Activity in Case 7:16-cv-01631-TMC South Carolina Clean Air Initiative LLC v. Harbor Freight Tools Complaint

**This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.**

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U.S. District Court

**District of South Carolina**

**Notice of Electronic Filing**

The following transaction was entered on 5/23/2016 at 12:57 PM EDT and filed on 5/20/2016

**Case Name:** South Carolina Clean Air Initiative LLC v. Harbor Freight Tools  
**Case Number:** [7:16-cv-01631-TMC](#)  
**Filer:** South Carolina Clean Air Initiative LLC  
**Document Number:** [1](#)

**Docket Text:**

**COMPLAINT against Harbor Freight Tools (Filing fee \$400 receipt number 0420-6563697), filed by South Carolina Clean Air Initiative LLC. Service due by 8/22/2016.(kmca)**

**7:16-cv-01631-TMC Notice has been electronically mailed to:**

Terry Edward Richardson, Jr [trichardson@rpwb.com](mailto:trichardson@rpwb.com), [bschmidt@rpwb.com](mailto:bschmidt@rpwb.com), [mcruez@rpwb.com](mailto:mcruez@rpwb.com),  
[wcarden@rpwb.com](mailto:wcarden@rpwb.com)

Daniel S Haltiwanger [dhaltiwanger@rpwb.com](mailto:dhaltiwanger@rpwb.com), [mcruez@rpwb.com](mailto:mcruez@rpwb.com)

Thomas Christopher Tuck [ctuck@rpwb.com](mailto:ctuck@rpwb.com), [twillis@rpwb.com](mailto:twillis@rpwb.com)

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**7:16-cv-01631-TMC Notice will not be electronically mailed to:**

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**n/a

**Electronic document Stamp:**

[STAMP dcecfStamp\_ID=1091130295 [Date=5/23/2016] [FileNumber=7305720-0  
] [002d8d2dc5a91f0889c07493b07028244ed26087053686f74bde30cec984e925a1a  
3c47eee230f25f5aa82a8e084affb0d0a22df62d9ecb8afdadc97e7327a76]]

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# DOCUMENT 2

## Tozzi, Lauren

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**From:** Belser, Evan  
**Sent:** Friday, September 02, 2016 1:33 PM  
**To:** Tozzi, Lauren  
**Subject:** FW: SCCAI v. Harbor Freight  
**Attachments:** 01631\_16-05-20\_Complaint.pdf

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**From:** Belser, Evan  
**Sent:** Thursday, May 26, 2016 10:00 AM  
**To:** Guerry, William M. <WGuerry@KelleyDrye.com>  
**Subject:** SCCAI v. Harbor Freight

FYI

Evan Belser  
Chief, Mobile Source Enforcement Branch, Air Enforcement Division  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
202-564-6850

*Do not release this email. This is confidential attorney-client communication and privileged attorney work product created for law enforcement purposes.*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
SPARTANBURG DIVISION

South Carolina Clean Air Initiative, LLC	)	
	)	
	)	
Plaintiff,	)	
	)	Civil Action No. _____
v.	)	
	)	CLASS ACTION COMPLAINT
Harbor Freight Tools,	)	
	)	
Defendant.	)	
	)	

**COMPLAINT**

Plaintiff, the South Carolina Clean Air Initiative, LLC (hereinafter “Plaintiff” or “SCCAI”), by and through its undersigned attorneys, files this Complaint against Defendant Harbor Freight Tools, (hereinafter “Defendant” or “Harbor Freight”), and in support thereof, states as follows:

1. Plaintiff SCCAI brings this lawsuit on behalf of itself, the proposed class, and the public to prevent Defendant, Harbor Freight, from violating the federal Clean Air Act and its enacting regulations, exposing the public to excessive and unlawful amounts of harmful air pollution, and defrauding and misleading consumers of the legally required emissions control devices and systems (hereinafter “ECS”) warranties for Defendant’s products.
2. This suit seeks injunctive relief, the assessment of civil penalties, and an award of attorneys’ fees and costs pursuant to the Clean Air Act and regulations promulgated thereunder.

**THE CLEAN AIR ACT**

3. This action arises under the Clean Air Act, 42 U.S.C. § 7401 et al., and the regulations promulgated thereunder. The Clean Air Act is designed to protect and enhance the quality of the

nation's air so as to promote the health and welfare and the productive capacity of its population. To that end, the Clean Air Act and related regulations aim to reduce emissions from, among other things, mobile sources of air pollution from engine powered on-road and off-road vehicles and other engine powered, mobile equipment.

4. The Environmental Protection Agency (hereinafter "EPA") has been statutorily granted the authority for promulgating emissions standards and limitations for, among other things, nonroad engines and vehicles under 42 U.S.C. § 7547, which is section 213 of the Clean Air Act.

5. This action is brought under section 304 of the Clean Air Act, 42 U.S.C. § 7604 (citizen suit provision), which authorizes "any person [to] commence a civil action on his own behalf against any person who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." 42 U.S.C. § 7604(a). Such actions are commonly referred to as "citizen suits."

6. Emission standard or limitation is defined to include "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard" or "any permit term or condition, and any requirement to obtain a permit as a condition of operations." *See* 42 U.S.C. § 7604(f)(1)-(4).

7. Under section 302 of the Clean Air Act, 42 U.S.C. § 7602, the term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

8. The term "manufacturer" as used in the Clean Air Act "means any person engaged in the manufacturing or assembling of new motor vehicles, new motor vehicle engines, new nonroad

vehicles or new nonroad engines, or importing such vehicles or engines for resale, or who acts for and is under the control of any such person in connection with the distribution of new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines, but shall not include any dealer with respect to new motor vehicles, new motor vehicle engines, new nonroad vehicles or new nonroad engines received by him in commerce.” 42 U.S.C. § 7550(1).

9. The term “nonroad engine” means an “internal combustion engine (including the fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under section[s]” 7411 or 7521 of the Clean Air Act. 42 U.S.C. § 7550(10).

10. The term “nonroad vehicle” means a “vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.” 42 U.S.C. § 7550(11).

11. The term “owners manual” means a “document or collection of documents prepared by the engine manufacturer for the owner or operator to describe appropriate engine maintenance, applicable warranties, and any other information related to operating or keeping the engine. The owners manual is typically provided to the ultimate purchaser at the time of sale. The owners manual may be in paper or electronic format.” 40 C.F.R. §§ 1054.801.

12. Section 207(a) of the Clean Air Act (42 U.S.C. § 7541(a)) requires certifying manufacturers to warrant to purchasers that their engines and equipment are designed, built, and equipped to conform at the time of sale to the applicable regulations for their full useful life. *See also* 42 U.S.C. § 7547(d) (incorporating the standards of § 7541 to nonroad engines and vehicles). The manufacturer must include a warranty that the engines and equipment are free from defects in materials and workmanship that would cause them to fail to conform to the applicable regulations during the specified warranty period. Several provisions in the Code of Federal Regulations



(“CFR”) specify the mode of communication of the ECS components warranty, its content, warranty prohibitions, and duration requirements for nonroad engines and vehicles.

13. The emissions standards and limitations regarding warranties promulgated by the EPA for nonroad engines and vehicles pertinent to this suit can be found in the CFR at 40 C.F.R. Parts 1039, 1048, 1051, 1054, and 1068.

14. 40 C.F.R. Part 1068 contains the EPA’s general compliance provisions for highway, stationary, and nonroad programs.

15. 40 C.F.R. Part 1039 contains the EPA’s provisions for control of emission from new and in-use nonroad compression-ignition engines.

16. 40 C.F.R. Part 1048 contains the EPA’s provisions for control of emissions from new, large nonroad spark-ignition engines.

17. 40 C.F.R. Part 1051 contains the EPA’s provisions for control of emissions from recreational engines and vehicles.

18. 40 C.F.R. Part 1054 contains the EPA’s provisions for control of emissions from new, small nonroad spark-ignition engines and equipment.

19. Anyone who sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported into the United States a nonroad engine or equipment that violates a Clean Air Act ECS warranty requirement on or after January 12, 2009 is subject to a civil penalty of up to \$37,500 for each such vehicle and violation. *See* 40 C.F.R. § 1068.101(b)(6).

20. This Court has jurisdiction over the subject matter and parties to this action as stated further herein.

## **PARTIES**

21. Plaintiff SCCAI is a limited liability company that is a citizen of the State of South Carolina concerned with the protection of the environment.

22. Defendant Harbor Freight is a privately held company with its principal place of business in Calabasas, California.

23. Defendant Harbor Freight manufactures generators and standby power equipment. Defendant Harbor Freight is one of the largest discount tool retailers in the United States with over 600 locations nationwide; 13 of which are in South Carolina.

24. Defendant Harbor Freight is a “manufacturer” as defined under the Clean Air Act and Code of Federal Regulations, including 42 U.S.C. § 7550(1).

25. Defendant Harbor Freight is also a “person” as defined by the Clean Air Act.

26. Accordingly, SCCAI is authorized by statute to initiate this citizen suit against Defendant Harbor Freight for violations of emission standards or limitations in the Clean Air Act.

27. Defendant Harbor Freight is authorized to conduct and does conduct business in the State of South Carolina. Defendant Harbor Freight has retail outlets and distribution centers in the State of South Carolina. Defendant Harbor Freight also advertises its products in television, radio, and print format in the State of South Carolina, and it sells its products via the internet to consumers in the State of South Carolina.

28. SCCAI owns products manufactured and/or distributed by Defendant Harbor Freight and has operated them in South Carolina, its members are exposed to the emissions from the Defendant Harbor Freight’s generators, and SCCAI is in possession of the warranties on the Defendant Harbor Freight’s products.

29. At all times relevant to this action, Defendant Harbor Freight has been engaged in the business as a manufacturer of nonroad engines and offering for sale, introducing into commerce,

delivering for introduction into commerce, or importing (or causing the foregoing with respect to) all engines in the United States sold by or bearing Defendant Harbor Freight trademarks; including the PREDATOR trademark.

30. In the process of acquiring the Defendant Harbor Freight's products SCCAI encountered many of the Clean Air Act emissions warranty violations which are the subject of this citizen suit. SCCAI also began researching the purchase of used Harbor Freight equipment, but encountered information concerning Harbor Freight products that indicated that used equipment would not carry a warranty. As a result of the Clean Air Act emissions warranty violations encountered, SCCAI ultimately chose not to purchase additional Harbor Freight equipment except of that set forth below.

### **JURISDICTION, VENUE, AND NOTICE**

31. This Court has subject matter jurisdiction under 42 U.S.C. § 7604 and the federal jurisdiction statute 28, U.S.C. § 1331 (federal question jurisdiction). The relief requested is authorized pursuant to 42 U.S.C. § 7604 and 28 U.S.C. §§ 2201 & 2202.

32. This action arises under Title II of the Act, as amended, 42 USC § 7521 et seq. and the regulations promulgated thereunder, which aim to protect human health and the environment by reducing the emission of nitrogen oxides (NOx) and other pollutants for mobile sources of air pollution.

33. The EPA administers a certification program to ensure that every engine introduced into commerce in the United States of America satisfies the applicable emissions standards and requirements 42 USC § 7521. Under this program the EPA issues Certificates of Conformity (COC).

34. To obtain a COC a manufacturer must submit an application to EPA for each model year and for each test group of engine a manufacturer intends to enter or introduce into commerce in the ISA. (40 CFR § 1054). Once granted a COC remains valid unless revoked, including under the prohibitions of 40 CFR § 1068.

35. Pursuant to the federal venue statute, 28 U.S.C. § 1391(b) & (c), venue is proper in this Court as a substantial part of the events or omissions giving rise to the claim occurred within the Spartanburg District of South Carolina and because Defendant Harbor Freight is subject to the Court's personal jurisdiction as it has distributors or stores within the Spartanburg District and its products are sold by other vendors within the Spartanburg District.

36. Specifically, Defendant Harbor Freight has a store located at 1440 W.O. Ezell BLVD, Spartanburg, South Carolina 29301.

37. In compliance with 42 U.S.C. § 7604(b)(1)(A), on August 26, 2015 SCCAI notified in writing Defendant Harbor Freight, the Administrator of the Environmental Protection Agency (the "EPA"), and the State of South Carolina through the South Carolina Department of Health and Environmental Control ("SCDHEC") of SCCAI's intent to sue for the violations alleged in this Complaint. More than sixty days have passed since the notice letter was sent. Defendant has violated and remains in violation of the Clean Air Act. Neither the EPA nor the State of South Carolina has commenced or is diligently prosecuting a court action to redress Defendant Harbor Freight's violations. A copy of the letter is attached as Exhibit 1.

38. Simultaneous with the filing of this citizen suit, SCCAI is also serving a copy of the Complaint on the Attorney General of the United States and the EPA Administrator in accordance with 42 U.S.C. § 7604(c)(3).

## **GENREAL ALLEGATIONS AND CAUSES OF ACTION**

### **Count I: Missing and Disclaimed ECS Warranty**

39. Plaintiff re-alleges and incorporates all other paragraphs.

40. Under the Clean Air Act, Defendant Harbor Freight must warrant to the ultimate purchaser and each subsequent purchaser that a Harbor Freight new nonroad engine, including all parts of its emission control system, meets certain conditions. The emission related warranty provisions must be described in the owners manual and be valid for a prescribed period of time. 40 C.F.R. §§ 1054.120.

41. Despite the requirements above, a Harbor Freight product known as a Predator 2 cycle recreational gas generator was purchased by SCCAI that lacked an adequate ECS warranty.

42. Initially, the product was delivered with no owners manual. SCCAI was directed to download an owners manual from the Defendant Harbor Freight's website and did so.

43. In the Harbor Freight owners manual obtained by SCCAI, the Defendant purports to grant a Limited 90 Day Warranty that specifically disclaims all other warranties, apparently including the Emissions Control System Warranty found on the same page.

44. The Limited Warranty is in lieu of any other warranties and reads: **"THIS WARRANTY IS IN EXPRESSLY LIEU OF ALL OTHER WARRANTIES, EXPESS OR IMPLIED, INCLUDNG WARRANTIES OF MERCHANTABILITY AND FITNESS"** (emphasis added).

45. Therefore, by Harbor Freight's language as the author of this document, all other warranties including the accompanying Emissions Control System Warranty are declared null and void.

46. Moreover, the 90 Day Limited Warranty is valid only to the original purchaser and is not transferable. These limitations are violations of 40 CFR § 1054.120.

### **Count II: Missing "Open-Source" Disclaimer**

47. Plaintiff re-alleges and incorporates all other paragraphs.

48. Under the Clean Air Act, specifically 40 C.F.R. §§ 1054.125(f), Defendant Harbor Freight must provide an owner's manual to owners and the manual must describe the proper engine maintenance to keep the engine in compliance with the ECS warranty requirements. For example, the law requires manufactures to:

[s]tate clearly on the first page of your written maintenance instructions that a repair shop or person of the owner's choosing may maintain, replace, or repair emission-control devices and systems. Your instructions may not require components or service identified by brand, trade, or corporate name. Also, do not directly or indirectly condition your warranty on a requirement that the vehicle be serviced by your franchised dealers or any other service establishments with which you have a commercial relationship.

49. The Harbor Freight warranty obtained by SCCAI following the purchase of a Harbor Freight product is not fully compliant with this "open-source" disclaimer requirement.

50. The Harbor Freight owners manual attached hereto as Exhibit 2, and incorporated herein by reference, lack this required disclaimer.

### **Count III: Language Conflicting with "Open-Source" Disclaimer**

51. Plaintiff re-alleges and incorporates all other paragraphs.

52. Under the Clean Air Act, Defendant Harbor Freight must provide an owner's manual to consumers and the manual must describe the proper engine maintenance to keep the engine in compliance with the ECS warranty requirements.

53. Specifically, 40 C.F.R. §§ 1054.125(f) requires manufactures to

[s]tate clearly **on the first page of your written maintenance instructions** that a repair shop or person **of the owner's choosing** may maintain, replace, or repair emission-control devices and systems. Your instructions may not require components or service identified by brand, trade, or corporate name. Also, **do not directly or indirectly condition your warranty on a requirement that the vehicle be serviced by your franchised dealers or any other service establishments with which you have a commercial relationship.** (Emphasis added).

54. The requirements of 1054.125(f) may be disregarded 1) if the manufacturer provides a component or service without charge under the purchase agreement or 2) if the EPA has waived the prohibition in the public's interest. Harbor Freight does not qualify for either of these two exceptions.

55. The EPA has not waived the requirements of 1054.125(f) for Harbor Freight.

56. Harbor Freight does not provide physical addresses to which a covered component can be taken in person for repair.

57. Under the language of the Limited 90 Day Warranty, "the product or part must be returned to us with transportation charges prepaid."

58. Likewise, under the Emissions Control System Warranty language, the language states "You are responsible for shipping your engine to a HFT warranty station as soon as a problem exists."

59. By requiring the purchaser to pay for transportation costs and shipping, Harbor Freight is not providing the repair service without costs to the customer.

#### **Count IV: Limiting Warranty Service to Authorized dealers**

60. Plaintiff re-alleges and incorporates all other paragraphs.

61. Under the Clean Air Act, Harbor Freight must provide an owner's manual to consumers and the manual must describe the proper engine maintenance to keep the engine in compliance with the ECS warranty requirements. The law requires manufactures to:

[s]tate clearly on the first page of your written maintenance instructions that a repair shop or person of the owner's choosing may maintain, replace, or repair emission-control devices and systems. Your instructions may not require components or service identified by brand, trade, or corporate name. Also, do not directly or indirectly condition your warranty on a requirement that the vehicle be serviced by your franchised dealers or any other service establishments with which you have a commercial relationship.

62. Pursuant to 40 C.F.R. § 1068.101(b)(6), manufacturers and others “are **prohibited from directly or indirectly communicating** to the ultimate purchaser or a later purchaser that the emission-related **warranty is valid only if the owner has service performed at authorized facilities** or only if the owner uses authorized parts, components, or systems.” (emphasis added).

63. The Harbor Freight owner’s manual attached hereto as Exhibit 2 includes language indirectly conditioning and/or communicating to the ultimate purchase or later purchaser that the warranty maintenance or service is valid only at dealerships or establishments with which Harbor Freight has relationships and if owners ship the products pre-paid.

#### **Count VI: Lack Of Contact information**

64. Plaintiff re-alleges and incorporates all other paragraphs.

65. Pursuant to 40 C.F.R. § 1054.120(f)(1) manufacturers and others must meet minimum conditions for owners will be able to promptly obtain warranty repairs. It reads: “You must provide and monitor a toll free telephone number **and email address** for owners to receive information on how to make a warranty claim, and how to make arrangements for authorized repair.” (Emphasis added).

66. Harbor Freight’s owner’s manual lacks the required email address.

#### **Count VII: Unauthorized Transportation Cost Limitation in Warranty**

67. Plaintiff re-alleges and incorporates all other paragraphs.

68. The Clean Air Act allows the denial of warranty claims “only for failures that have been caused by the owner’s or operator’s improper maintenance or use, by accidents for which [the manufacturer has] no responsibility, or by acts of God.” 40 C.F.R. § 1068.115(a).

69. The CAA requires manufacturers to assume all costs associated with diagnosing and repairing or replacing ECS parts. 40 C.F.R. § 1068.110(e) states that “Owners are responsible for



properly maintaining their engines/equipment; however, owners may make warranty claims against the manufacturer for **all** expenses related to diagnosing and repairing or replacing emission-related parts, as described in § 1068.115.” (emphasis added).

70. Under the Limited 90 Day Warranty section, the attached 2 Cycle Recreational Gas Generator owner’s manual states that “To take advantage of this warranty, the product or part must be returned to us with transportation charges prepaid.” Exhibit 2 at 18.

71. The attached 2 Cycle Recreational Gas Generator owner’s manual also states in the Emissions Control System Warranty section that “Where a warrantable condition exists, HFT will repair your engine at no cost to you including diagnosis, parts and labor.” *Id.* It does not contain language indicating that Harbor Freight will pay transportation costs of the ECS component when warrantable conditions exist.

72. The attached 2 Cycle Recreational Gas Generator owner’s manual further states in the Emissions Control System Warranty section that “You are responsible for shipping your engine to a HFT warranty station as soon as a problem exists.” *Id.* at 18.

73. The attached 2 Cycle Recreational Gas Generator owner’s manual does not contain any language indicating that Harbor Freight will pay transportation costs of the ECS component when warrantable conditions exist. Thus, upon information and belief and given the additional language found in the owner’s manual related to transportation costs, Harbor Freight does not pay the transportation costs of the repair or replacement of ECS components in violation of the CAA.

#### **COUNT VIII: Missing Altitude Adjustment Language**

74. Plaintiff re-alleges and incorporates all other paragraphs.

75. Upon information and belief, Harbor Freight relies on altitude jet charts for altitude adjustment.

76. The use of these altitude charts carries the obligations listed in 40 C.F.R. § 1054.115(c) and the requirement to state “in the owners manual the altitude range for which you expect proper engine performance and emission control with and without the altitude kit” and to state “that operating the engine with the wrong engine configuration at a given altitude may increase its emissions and decrease fuel efficiency and performance.”

77. As demonstrated by the attached 2 Cycle Recreational Gas Generator owner’s manual, Harbor Freight does not include the statements required under 40 C.F.R. § 1054.115(c). This is a violation of the CAA.

### **Injunctive Relief**

78. Plaintiff re-alleges and incorporates all other paragraphs.

79. Plaintiff and the proposed class set forth below were entitled to receive warranties that complied with the requirements of the Clean Air Act.

80. Plaintiff seeks on behalf of itself and the class a declaration that Harbor Freight has violated and continues to violate the Clean Air Act and its implementing regulations by failing to comply with the required ECS warranty language as outlined above.

81. Plaintiff also seeks to permanently enjoin Harbor Freight from offering for sale, introducing into commerce, delivering for introduction into commerce, or importing into the United States (or causing any of the foregoing acts) any new engine that does not contain the required emissions warranty language as identified above and commanding Harbor Freight to include the proper emissions warranty language in its owner’s manuals.

### **CLASS ACTION ALLEGATIONS**

82. Plaintiff re-alleges and incorporates all other paragraphs.

83. Plaintiff brings this lawsuit as a class action on behalf of itself and all others similarly situated as members of a proposed plaintiff class action. This action satisfies the requirements for class certification under Rule 23.

84. The proposed Class is initially defined as follows:

All persons who purchased a product manufactured or sold by Harbor Freight that contains a nonroad engine for which the warranty is not in compliance with the requirements of the Clean Air Act.

85. Plaintiff may also seek to certify additional subclasses, as the Court would deem appropriate. Excluded from the Class are: (1) employees of Harbor Freight, including their officers and directors; and (2) any judge to whom this action is assigned and the judge's immediate family.

**I. The Proposed Class and Sub-Classes Satisfy Rule 23(a).**

**A. Numerosity and Ascertainability**

86. Upon information and belief, the Class is comprised of thousands of Harbor Freight customers throughout the nation, thus making joinder impractical.

87. The Class is composed of an easily ascertainable, set of individuals and entities whose identities can be readily determined.

**B. Predominance of Common Issues**

88. There are numerous questions of law and fact common to all Class members, and those questions predominate over any questions that may affect only individual Class members.

89. There are (at least) two predominant common questions:

1. Whether the Defendant supplied the warranties as required by the Clean Air Act;
2. Whether Plaintiff and the Class are entitled to declaratory or injunctive relief.

### **C. Typicality**

90. Plaintiff's claims are typical of the claims of the Class. Plaintiff and the Class were subjected to the same kind of improper conduct and the claims of Plaintiff and the Class are based on the same legal theories.

### **D. Adequacy**

91. Plaintiff will fairly and adequately represent and protect the interests of the Class. Plaintiff has retained counsel with substantial experience in prosecuting consumer class actions. Plaintiff and his counsel are committed to vigorously prosecuting this action on behalf of the Class. Neither Plaintiff nor his Counsel has interests adverse to those of the Class.

## **II. The Proposed Class Satisfies Rule 23(b).**

92. Injunctive relief is appropriate as to the Class as a whole because Defendants have acted or refused to act on grounds generally applicable to the Class.

93. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Additionally, questions of law or fact common to class members predominate over questions involving only individual members. Because of the relatively modest economic damage of the individual Class members' claims, few would likely seek their rightful legal recourse.

94. Without a class action, individual Class members would face burdensome litigation expenses, deterring them from bringing suit or adequately protecting their rights. A class action will allow Class members whose claims are too small to warrant an individual action.

95. A class action will conserve judicial resources and promote a fair and consistent resolution of these claims. Absent a class action, Class members would continue to incur harm without remedy, while Defendants would continue to reap the benefits of its misconduct.

WHEREFORE, based upon the allegations set forth above, Plaintiff respectfully requests that this Court:

A. Declare that Harbor Freight has violated and continues to violate the Clean Air Act and its implementing regulations by failing to comply with the required ECS warranty language as outlined above;

B. Permanently enjoin Harbor Freight from offering for sale , introducing into commerce, delivering for introduction into commerce, or importing into the United States (or causing any of the foregoing acts) any new engine that does not contain the required emissions warranty language as identified above and commanding Harbor Freight to include the proper emissions warranty language in its owner's manuals;

C. Order a remedy for consumers who have paid for but obtained defective goods, to include re-issuance of valid ECS warranties and other incentives, to make consumers whole, along with a mechanism to inform consumers of such campaigns;

D. Order Defendant to take other appropriate action, including beneficial mitigation projects authorized under the Clean Air Act, 42 U.S.C. § 7604(g)(2), to remedy, mitigate, and offset the harm to the public health and the environment caused by the violations alleged above;

E. Enter a judgment indicating that Harbor Freight is liable to the United States for its emissions warranty violations and assessing appropriate civil penalties in the amount of up to \$37,500 per day for each violation;

F. Award Plaintiff its reasonable costs and attorneys' fees related to this action; and

G. Grant such other relief as the Court deems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff demands a jury trial on all issues so triable.

/s/ Terry E. Richardson, Jr.  
Terry E. Richardson, Jr.  
E-Mail: [trichardson@rpwb.com](mailto:trichardson@rpwb.com)  
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Charles J. Bridgmon  
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ATTORNEYS FOR PLAINTIFFS

Barnwell, South Carolina

May 20, 2016

# DOCUMENT 3

## Tozzi, Lauren

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**From:** Belser, Evan  
**Sent:** Friday, September 02, 2016 1:32 PM  
**To:** Tozzi, Lauren  
**Subject:** FW: Citizen Suit v Harbor Freight

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**From:** Stahle, Susan  
**Sent:** Wednesday, June 01, 2016 1:27 PM  
**To:** Belser, Evan <Belser.Evan@epa.gov>; Jackson, Cleophas <jackson.cleophas@epa.gov>  
**Cc:** Giuliano, Julia <giuliano.julia@epa.gov>; Carlson, Philip <carlson.philip@epa.gov>; Kulschinsky, Edward <Kulschinsky.Edward@epa.gov>  
**Subject:** RE: Citizen Suit v Harbor Freight

I will note I am out of the office from June 2 through June 10 so I will not be on the next two weekly OECA/OTAQ/OGC calls.

Please invite David Orlin to any conversations you have about this citizen suit. I am going to touch base with him about it today.

Thanks.

Susan Stahle  
Attorney-Advisor  
Air and Radiation Law Office  
Office of General Counsel  
U.S. Environmental Protection Agency  
202-564-1272 (ph)  
202-564-5603 (fax)  
[stahle.susan@epa.gov](mailto:stahle.susan@epa.gov)

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**From:** Belser, Evan  
**Sent:** Friday, May 27, 2016 9:45 AM  
**To:** Jackson, Cleophas <[jackson.cleophas@epa.gov](mailto:jackson.cleophas@epa.gov)>  
**Cc:** Giuliano, Julia <[giuliano.julia@epa.gov](mailto:giuliano.julia@epa.gov)>; Carlson, Philip <[carlson.philip@epa.gov](mailto:carlson.philip@epa.gov)>; Kulschinsky, Edward <[Kulschinsky.Edward@epa.gov](mailto:Kulschinsky.Edward@epa.gov)>; Stahle, Susan <[Stahle.Susan@epa.gov](mailto:Stahle.Susan@epa.gov)>  
**Subject:** RE: Citizen Suit v Harbor Freight

[REDACTED]

[REDACTED]

Thanks,  
Evan

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**From:** Jackson, Cleophas  
**Sent:** Friday, May 27, 2016 9:43 AM



**To:** Belser, Evan <[Belser.Evan@epa.gov](mailto:Belser.Evan@epa.gov)>

**Cc:** Giuliano, Julia <[giuliano.julia@epa.gov](mailto:giuliano.julia@epa.gov)>; Carlson, Philip <[carlson.philip@epa.gov](mailto:carlson.philip@epa.gov)>; Kulschinsky, Edward <[Kulschinsky.Edward@epa.gov](mailto:Kulschinsky.Edward@epa.gov)>; Stahle, Susan <[Stahle.Susan@epa.gov](mailto:Stahle.Susan@epa.gov)>

**Subject:** Re: Citizen Suit v Harbor Freight

[REDACTED]

Sent from my iPhone

On May 27, 2016, at 9:27 AM, Belser, Evan <[Belser.Evan@epa.gov](mailto:Belser.Evan@epa.gov)> wrote:

Thanks very much.

[REDACTED]

Thanks,  
Evan

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**From:** Giuliano, Julia

**Sent:** Friday, May 27, 2016 7:55 AM

**To:** Belser, Evan <[Belser.Evan@epa.gov](mailto:Belser.Evan@epa.gov)>; Carlson, Philip <[carlson.philip@epa.gov](mailto:carlson.philip@epa.gov)>

**Cc:** Kulschinsky, Edward <[Kulschinsky.Edward@epa.gov](mailto:Kulschinsky.Edward@epa.gov)>; Jackson, Cleophas <[jackson.cleophas@epa.gov](mailto:jackson.cleophas@epa.gov)>; Stahle, Susan <[Stahle.Susan@epa.gov](mailto:Stahle.Susan@epa.gov)>

**Subject:** RE: Citizen Suit v Harbor Freight

Phil and I worked on this response for quite some time prior to sending it to Bill Guerry. Below is the note Phil sent to Bill.

Bill,

Julia and I had a chance to go through your email regarding emission warranties sent on 10/31/2015. I have added in "EPA Responses" to the summary, as noted below.

Phil Carlson, Engineer  
Gasoline Engine Compliance Center  
Compliance Division  
Office of Transportation and Air Quality  
Office of Air and Radiation  
U.S. EPA

**From:** Guerry, William M. [<mailto:WGuerry@KelleyDrye.com>]

**Sent:** Friday, October 30, 2015 10:25 AM

**To:** Giuliano, Julia <[giuliano.julia@epa.gov](mailto:giuliano.julia@epa.gov)>; Carlson, Philip <[carlson.philip@epa.gov](mailto:carlson.philip@epa.gov)>; Stout, Alan <[stout.alan@epa.gov](mailto:stout.alan@epa.gov)>

**Subject:** Follow Up to October 15th Calls

Julia, Phil, and Alan—

Thank you for the helpful interpretive guidance each of you provided me on our calls on October 15<sup>th</sup>. Below I have prepared a short summary of our individual, but related calls. Can you please review this summary and confirm it is accurate?

### **Summary of Calls on October 15<sup>th</sup>**

#### **I. General Issues with Emission Warranties vs. the Separate General Commercial Warranty**

The CAA and EPA's implementing regulations, and its corresponding review of certification applications, address the "emission warranty" that must be submitted and approved as part of the applications. You confirmed that general, commercial warranties are outside the scope of the EPA's certification program and regulations, and the CAA requirements and EPA regulations therefore apply only to emission warranties and not to general "commercial warranties." Because the "emission warranty" is required under the rules and is reviewed and approved by EPA as part of the certification, we understand that EPA considers the "emission warranty" to be enforceable on its own terms.

EPA Response: The warranty requirements for small SI engines are contained in section 1054.120 of the regulations. The warranty provisions of 1054.120 apply to the emission control system and are separate from any other type of general warranty offered by the manufacturer.

#### **II. Emission Warranty Obligations Exclusively Apply to the Certifying Manufacturer**

EPA's regulations explicitly establish that the "*certifying manufacturer*" of an engine family, not non-integrated OEM's or other downstream sellers, are required to provide the emission warranty to purchasers that its engines/equipment are compliant and free from defects in materials and workmanship.

EPA Response: The warranty regulations in section 1054.120 apply to the manufacturer certifying an engine family with EPA.

### III. **“Open Source” Provisions for “Source of Parts and Repairs”**

EPA’s regulations contain “open source” provisions generally prohibiting the certifying manufacturer from conditioning and rejecting an emission warranty claim solely on the basis that the engine had received normal, non-emissions related “wear and tear” maintenance-service by a dealer or service provider that was not part of the manufacturer’s authorized service network. However, the “open source” provisions do not apply when a manufacturer provides “a component or service without charge under the purchase agreement”—such as through its emission warranty coverage. Further, it is not necessary to place an “open source” statement on the first page of the certifying manufacturer’s written maintenance instructions, as provided in the regulations, as long as this information is provided on a manufacturer’s web site; nor is it necessary for a manufacturer to use the identical “open source” wording described in the regulations.

EPA Response: The regulations in 1054.125(f) require manufacturers to state clearly on the first page of their written maintenance instructions that a repair shop or person of the owner's choosing may maintain, replace, or repair emission control devices and systems. Section 1054.801 states an owners manual may be in paper or electronic format. EPA regulations do not specify where an electronic owners manual should be located. Manufacturers may disregard the requirement to state the repair-related information on the first page of their written maintenance instructions if they provide a component or service without charge under the purchase agreement. EPA does not currently require manufacturers to submit a copy of the maintenance instructions as part of the materials reviewed for small SI engine certification.

#### **IV. Fuel Issues in Warranty**

The emission warranty regulations state that a certifying manufacturer cannot deny an emission warranty claim based on “the use of a fuel that is commonly available...unless your written maintenance instructions state that the fuel would harm the equipment’s emission control system and operators can readily find the proper fuel.” You confirmed that this requirement is satisfied if a manufacturer specifies in the maintenance instructions the type(s) of fuels that are compatible—and includes a generic statement in the manual that failure to use those identified proper fuel(s) may harm the engine and void the emission warranty. There is no requirement to identify improper fuels on the emission label.

EPA Response: The regulations in section 1068.115 state that manufacturers may not deny emission-related warranty claims based on the use of any fuel that is commonly available where the equipment operates unless the written maintenance instructions state that this fuel would harm the equipment's emission control system and operators can readily find the proper fuel. The label regulations in section 1054.135(d) note that the requirements for fuel and lubricants can be included on the label or in the owner’s manual, so including a list of fuels that are compatible with the engine in the owner’s manual is consistent with the labeling regulations. There is no requirement to identify ‘improper’ fuels on the emission label under the labeling regulations in section 1054.135.

#### **V. Scope of Components Identified in Emission Warranty**

EPA’s emission warranty regulations state that the warranty covers all emission-related components, including components listed at 40 CFR Part 1068, Appendix I. As long as the

warranty effectively describes and identifies the affected emission components, EPA does not require the certifying manufacturer to use language identical to Appendix I's list of components.

EPA Response: EPA's regulations in section 1054.120(c) require manufacturers to warrant all components whose failure would increase an engine's emissions of any regulated pollutant, including components listed in 40 CFR part 1068, Appendix I, and components from any other system you develop to control emissions. EPA's regulations in section 1054.120(f) state that manufacturers need to describe in the owner's manual the emission-related warranty provisions that apply to the engine. There is no requirement in the regulations to use any specific language in describing the warranty to the ultimate purchaser.

## **VI. Contact Information**

You confirmed that in the certification review process, EPA routinely approves web-site addresses in lieu of an email address as long as it adheres to the intent of allowing warranties to be authorized.

EPA Response: The regulations in section 1054.120(f) require that manufacturers provide and monitor a toll-free telephone number and an e-mail address for owners to receive information about how to make a warranty claim, and how to make arrangements for authorized repairs. EPA asks for this information as part of the small SI engine certification review. EPA will accept a website if the website offers a means for the user to send an email to the manufacturer concerning the emissions warranty that is monitored by the manufacturer.

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Thanks for confirming your helpful guidance. I would be happy to discuss.

Bill

The information contained in this E-mail message is privileged, confidential, and may be protected from disclosure; please be aware that any other use, printing, copying, disclosure or dissemination of this communication may be subject to legal restriction or sanction. If you think that you have received this E-mail message in error, please reply to the sender.

This E-mail message and any attachments have been scanned for viruses and are believed to be free of any virus or other defect that might affect any computer system into which it is received and opened. However, it is the responsibility of the recipient to ensure that it is virus free and no responsibility is accepted by Kelley Dr

*Life's too short. Eat dessert first!*

Julia Giuliano  
EPA – Mechanical Engineer  
2000 Traverwood Drive  
Ann Arbor, MI 48105  
734-214-4865

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**From:** Belser, Evan  
**Sent:** Thursday, May 26, 2016 5:19 PM  
**To:** Giuliano, Julia <[giuliano.julia@epa.gov](mailto:giuliano.julia@epa.gov)>; Carlson, Philip <[carlson.philip@epa.gov](mailto:carlson.philip@epa.gov)>  
**Cc:** Kulschinsky, Edward <[Kulschinsky.Edward@epa.gov](mailto:Kulschinsky.Edward@epa.gov)>; Jackson, Cleophas <[jackson.cleophas@epa.gov](mailto:jackson.cleophas@epa.gov)>; Stahle, Susan <[Stahle.Susan@epa.gov](mailto:Stahle.Susan@epa.gov)>  
**Subject:** Citizen Suit v Harbor Freight

FYI, Luc de Gaspe Beaubien's law firm has filed a citizen suit against Harbor Freight for warranty-related issues. This is as we've discussed over the past months on our Thursday calls. Bill Guerry just caught me, and mentioned some relevant applicability determinations or guidance that Phil and Julia provided around December 8. For my reference, could you share whatever you gave Bill?

Thanks,  
Evan

*Do not release this email. This is confidential attorney-client communication and privileged attorney work product created for law enforcement purposes.*